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Public Prosecutor v Mehdi Ebrahimkhani & Ors

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HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO WA-45A-11–06 OF 2020
MOHAMED ZAINI MAZLAN J
25 MAY 2021

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Criminal Procedure — Trial — Prima facie case — Accused charged for trafficking in dangerous drugs — Whether prosecution established prima facie case — Whether elements of offence proven — Whether accused were in actual possession of the drugs — Whether the accused were trafficking in the drugs — Whether there was common intention — Dangerous Drugs Act 1952 s 39B

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Upon receiving a tip-off, SP4 and his team of police officers went to an apartment located in Wangsa Maju ('the apartment'). Upon arriving at the apartment, SP4 found that the door and grill were locked. SP4 knocked on the door a few times before it was opened by the first accused SP4 introduced himself as a police officer and asked the first accused to open the door. The first accused however was panicky and did not accede to SP4's request. The first accused instead went back into the house. Thereafter, SP4 heard the sound of the toilet being flushed and the smell of chemicals permeating the air. Three minutes later, the first accused opened the door. The first accused appeared to be trembling and 'second accused looked nervous. SP4 went into the first room of the apartment and found paraphernalia that was suspected to be used to process drugs. Amongst the paraphernalia seized were two white and black containers containing liquids, one black pot, a weighing scale, a lamp, and some filter papers. SP4 also found one transparent plastic containing crystal substances suspected to be methamphetamine in a cupboard in the first room. The third accused, was arrested three days later by SP4 based on information given by the first and second accused and also the apartment's tenancy agreement. The seized drugs were analysed and found to be methamphetamine weighing 441.5g. All three accused were charged with trafficking under s 39B of the Dangerous Drugs Act 1952 ('the DDA 1952') and had claimed trial. The issue before the court was whether the prosecution had made out a prima facie case against the accused at the end of the prosecution's case.

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Held, calling the first and second accused to enter their defence; acquitting and discharging the third accused:

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(1) The chemist ('SP3') had concluded in his report that the drugs seized were 441.5g of methamphetamine and were categorised as dangerous drugs within the definition of s 2 of the DDA 1952, and listed in the First

Schedule of the DDA 1952. SP3's evidence was not inherently incredible. Therefore, the prosecution had proven that the drugs seized were scheduled as dangerous drugs under the DDA 1952 (see paras 17 & 19).

(2) The court was unable to accept the still images of the third accused captured from the close circuit television camera as proof that it was the third accused at the location of the apartment. There were no witnesses called to credibly identify the person in the still image as the third accused. In any event, even if the image was that of the third accused and that he was at the car park a day before the raid, this factor did not incriminate him. There were far too many explanations that could explain his presence. The mere fact that he was not in the apartment where the drugs were found negated any claim of knowledge and possession to satisfy this crucial element under s 39B of the DDA 1952. It was wholly insufficient for the prosecution to merely rely on the tenancy agreement or traces of his DNA on some of the items found in the apartment to implicate the third accused. Therefore, the prosecution had failed to prove a prima facie case against the third accused. The court could not simply call upon the third accused to enter his defence to merely hear his explanation. The third accused could not be convicted should he chose to remain silent if his defence was called (see paras 27–28).

(3) From the testimony of SP4, one could only access the lifts to the apartment by using an access card, which was one of the many items seized from the apartment. The fact that the first accused was the one that opened the door meant that he had control over the apartment, lived there and had unrestricted access. The fact that his DNA was found on some of the items in the house also inferred that he was an occupant. The transparent plastic of methamphetamine was in clear sight, and easily accessible to the first and second accused, as they were both in the same apartment and were in close proximity to the methamphetamine when the police raided the apartment. The fact that the packet of methamphetamine was placed in an open cupboard in an open room, and in close proximity to them, inferred knowledge on the part of the first and second accused, as the drugs were visible and accessible to both of them (see paras 30–31).

(4) As for the first and second accused's conduct during the raid, the first accused did not open the door immediately and had stalled for a few minutes by going back into the apartment. The sound of the toilet flushing and the overwhelming fumes that permeated the apartment suggested that they had attempted to dispose off incriminating evidence. The first accused was also trembling and both first and second accused were panicky throughout the raid. Their reaction and conduct were

relevant factors and could be used to infer knowledge under s 8 of the Evidence Act 1950. Therefore, the first and second accused's conduct and reaction during the raid amounted to an inference that they had knowledge of the drugs in the apartment. The prosecution had established actual possession of the drugs under the charges against the first and second accused (see paras 32 & 35).

(5) The drugs seized were methamphetamine, and weighed more than 50g, the presumption under s 37(da)(xvi) of the DDA 1952 was applicable against the first and second accused, and they were therefore deemed to be trafficking as stated in the charge (see para 37).

(6) The first and second accused were in the apartment, and no other persons were there during the raid. The drugs found were also in close proximity to them. There were no protests made by either of them during the raid and arrests. There were sufficient evidence to infer that there was a prior meeting of minds between the first and second accused and that there was therefore common intention (see para 40).

(7) The prosecution had succeeded in proving a prima facie case against the first and second accused in respect of the charge against them, as required under s 180(4) of the Criminal Procedure Code ('the CPC'). The first and second accused were, therefore, called to enter their defence following s 180(3) of the CPC. However, the prosecution had failed to prove a prima facie case against the third accused. He was therefore acquitted and discharged from the charge without being called for his defence (see paras 41–42).

[Bahasa Malaysia summary

Selepas menerima maklumat, SP4 dan sepasukan anggota polis pergi ke sebuah pangsapuri yang terletak di Wangsa Maju ('pangsapuri tersebut'). Sebaik tiba di pangsapuri tersebut, SP4 mendapati pintu dan jeriji berkunci. SP4 mengetuk pintu beberapa kali sebelum ia dibuka oleh tertuduh pertama. SP4 memperkenalkan diri sebagai pegawai polis dan meminta tertuduh pertama membuka pintu. Tertuduh pertama bagaimanapun panik dan tidak akur dengan permintaan SP4. Tertuduh pertama sebaliknya masuk semula ke dalam rumah. Selepas itu, SP4 terdengar bunyi tandas dipam dan bau bahan kimia meresap ke udara. Tiga minit kemudian, tertuduh pertama membuka pintu. Tertuduh pertama kelihatan terketar-ketar dan tertuduh kedua kelihatan gugup. SP4 masuk ke dalam bilik pertama pangsapuri tersebut dan menemui peralatan yang disyaki digunakan untuk memproses dadah. Antara barangan yang dirampas ialah dua bekas putih dan hitam berisi cecair, satu periuk hitam, penimbang, lampu dan beberapa kertas penapis. SP4 turut menemui satu plastik lutsinar mengandungi bahan kristal disyaki methamphetamine di dalam almari di bilik pertama. Tertuduh ketiga, ditahan tiga hari kemudian oleh SP4 berdasarkan maklumat yang diberikan oleh tertuduh pertama dan

kedua dan juga perjanjian penyewaan pangsapuri. Dadah yang dirampas telah dianalisis dan didapati dadah jenis methamphetamine seberat 441.5g. Ketiga-tiga tertuduh didakwa mengedar di bawah s 39B Akta Dadah Berbahaya 1952 ('ADB 1952') dan telah memohon untuk dibicarakan. Isu di hadapan mahkamah adalah sama ada pihak pendakwaan telah membuktikan kes prima facie terhadap tertuduh pada akhir kes pendakwaan

Diputuskan, memanggil tertuduh pertama dan kedua membela diri; membebaskan dan melepaskan tertuduh ketiga:

(1) Ahli kimia ('SP3') telah membuat kesimpulan dalam laporannya bahawa dadah yang dirampas adalah 441.5g methamphetamine dan dikategorikan sebagai dadah berbahaya dalam definisi s 2 ADB 1952, dan disenaraikan dalam Jadual Pertama DDA 1952. Keterangan SP3 sememangnya tidak boleh dipercayai. Oleh itu, pihak pendakwaan telah membuktikan bahawa dadah yang dirampas telah dijadualkan sebagai dadah berbahaya di bawah ADB 1952 (lihat perenggan 17 & 19).

(2) Mahkamah tidak dapat menerima imej pegun tertuduh ketiga yang dirakam daripada kamera litar tertutup sebagai bukti bahawa ia adalah tertuduh ketiga di lokasi pangsapuri tersebut. Tiada saksi yang dipanggil untuk mengenal pasti orang dalam imej pegun sebagai tertuduh ketiga. Walau apa pun, sekiranya imej tersebut adalah tertuduh ketiga dan beliau berada di tempat letak kereta sehari sebelum serbuan, faktor ini tidak melibatkan beliau. Terlalu banyak penjelasan yang boleh menjelaskan kehadirannya. Fakta bahawa beliau tidak berada di dalam pangsapuri di mana dadah tersebut ditemui menafikan sebarang dakwaan pengetahuan dan pemilikan untuk memenuhi elemen penting ini di bawah s 39B ADB 1952. Ianya adalah tidak mencukupi bagi pihak pendakwaan untuk hanya bergantung pada perjanjian penyewaan atau kesan DNAnya pada beberapa barang yang ditemui di pangsapuri tersebut untuk mengaitkan tertuduh ketiga. Oleh itu, pihak pendakwaan gagal membuktikan kes prima facie terhadap tertuduh ketiga. Mahkamah tidak boleh begitu sahaja memanggil tertuduh ketiga membela diri bagi mendengar penjelasannya sahaja. Tertuduh ketiga tidak boleh disabitkan sekiranya beliau memilih untuk berdiam diri sekiranya dipanggil membela diri (lihat perenggan 27–28).

(3) Daripada keterangan SP4, hanya seorang sahaja boleh mengakses lif ke pangsapuri tersebut dengan menggunakan kad akses, yang merupakan salah satu daripada barang yang dirampas dari pangsapuri tersebut. Fakta bahawa tertuduh pertama adalah orang yang membuka pintu bermakna beliau mempunyai kawalan ke atas pangsapuri tersebut, tinggal di sana dan mempunyai akses tanpa had. Fakta bahawa DNAnya ditemui pada beberapa barang di rumah itu juga menyimpulkan bahawa beliau adalah penghuni. Plastik lutsinar dadah jenis methamphetamine jelas kelihatan,

dan mudah diakses oleh tertuduh pertama dan kedua, kerana kedua-duanya berada di pangsapurti yang sama dan berada berdekatan dengan methamphetamine ketika polis menyerbu pangsapuri tersebut. Fakta bahawa paket methamphetamine tersebut diletakkan di dalam almari terbuka di dalam bilik terbuka, dan berdekatan dengan mereka, menyimpulkan pengetahuan di pihak tertuduh pertama dan kedua, kerana dadah tersebut boleh dilihat dan boleh diakses oleh mereka berdua (lihat perenggan 30–31).

(4) Bagi kelakuan tertuduh pertama dan kedua semasa serbuan, tertuduh pertama tidak segera membuka pintu dan berlengah beberapa minit dengan masuk semula ke dalam pangsapuri. Bunyi tandas yang dipam dan asap yang meresap ke dalam pangsapuri tersebut menunjukkan bahawa mereka telah cuba untuk melupuskan bukti yang menunjukkan kesalahan. Tertuduh pertama turut terketar-ketar dan kedua-dua tertuduh pertama dan kedua panik sepanjang serbuan. Reaksi dan kelakuan mereka adalah faktor yang relevan dan boleh digunakan untuk membuat kesimpulan pengetahuan di bawah s 8 Akta Keterangan 1950. Oleh itu, kelakuan dan reaksi tertuduh pertama dan kedua semasa serbuan adalah kesimpulan bahawa mereka mempunyai pengetahuan tentang dadah di pangsapuri tersebut. Pihak pendakwaan telah membuktikan milikan sebenar dadah di bawah pertuduhan terhadap tertuduh pertama dan kedua (lihat perenggan 32 & 35).

(5) Dadah yang dirampas adalah methamphetamine, dan seberat lebih 50g, anggapan di bawah s 37(da)(xvi) ADB 1952 adalah terpakai terhadap tertuduh pertama dan kedua, dan oleh itu mereka disifatkan sebagai mengedar seperti yang dinyatakan dalam pertuduhan (lihat perenggan 37).

(6) Tertuduh pertama dan kedua berada di pangsapuri tersebut, dan tiada orang lain berada di situ semasa serbuan. Dadah yang ditemui juga berada berdekatan dengan mereka. Tiada bantahan dibuat oleh salah seorang daripada mereka semasa serbuan dan tangkapan. Terdapat keterangan yang mencukupi untuk membuat kesimpulan bahawa terdapat pertemuan sebelum ini antara tertuduh pertama dan kedua dan oleh itu terdapat niat bersama (lihat perenggan 40).

(7) Pihak pendakwaan telah berjaya membuktikan kes prima facie terhadap tertuduh pertama dan kedua berkenaan dengan pertuduhan terhadap mereka, seperti yang dikehendaki di bawah s 180(4) Kanun Tatacara Jenayah ('KTJ'). Oleh itu, tertuduh pertama dan kedua dipanggil untuk membela diri mengikut s 180(3) KTJ. Bagaimanapun, pihak pendakwaan telah gagal membuktikan kes prima facie terhadap tertuduh ketiga. Oleh itu beliau dibebaskan dan dilepaskan daripada pertuduhan tanpa dipanggil membela diri (lihat perenggan 41–42).]

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)
Dato Mokhtar bin Hashim & Anor v Public Prosecutor [1983] 2 MLJ 232, FC (refd)
Husin bin Sitorus v PP [2012] 3 MLJ 782; [2012] 7 CLJ 205, CA (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1, FC (refd)
PP v Mohamed Ali [1962] 1 MLJ 257, HC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2005] 6 AMR 203, FC (refd)
PP v Teh Cheng Poh [1979] 1 LNS 82, HC (refd)
PP v Denish a/l Madhavan [2009] 2 MLJ 194, FC (refd)
Sahri Tahe v PP and other appeal [2016] 4 MLJ 69, CA (refd)
(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP [1987] 2 MLJ 336, SC (refd)

Legislation referred to

Criminal Procedure Code ss 180(1), (2), (3), (4), 402B
Dangerous Drugs Act 1952 ss 2, 37(d), 37(da)(xvi), 39B, 398, First Schedule
Evidence Act 1950 s 8
Penal Code s 34

Mohd Fuad bin Abdul Aziz (Deputy Public Prosecutor, Attorney General's Chambers) for the plaintiff.
Hasnan Hamzah (Qushwa bt Hasnan with him) (Hasnan Hamzah) for the first defendant.
Muhammad Fairuz bin Ahmad Yusof (Fairuz) for the second defendant.
Sivahnanthan Ragava (Kumar Chambers) for the third defendant.

Mohamed Zaini Mazlan J:

INTRODUCTION

[1] All three accused were charged under s 39B of the Dangerous Drugs Act 1952 ('the DDA 1952'). The charge read as follows:

> Bahawa kamu bersama-sama pada 02/07/2019 jam lebih kurang 5.30 petang di rumah alamat A-28-3A Seri Rania, Jalan Wangsa Delima 7, dalam Daerah Wangsa Maju, Wilayah Persekutuan, bagi mencapai niat bersama-sama telah mengedar dadah berbahaya Methamphetamine berat bersih 441.5 gram dan dengan itu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama dan dibaca bersama Seksyen 34 Kanun Keseksaan.

[2] They were in essence charged with trafficking in 441.5g of methamphetamine on 2 July 2019 at an apartment identified as A-28–3A, Seri Riana, at Jalan Wangsa Delima 7, Wangsa Maju, Kuala Lumpur ('the apartment'). All three accused claimed trial.

THE PROSECUTION'S CASE

[3] The prosecution called seven witnesses to testify. They were:

(a) SP1 — Steven Chooi Wai Choong (Landlord for the apartment)

(b) SP2 — L/Cpl Jasli bin Jahrin (Police Photographer)

(c) SP2 — L/Cpl Jasli bin Jahrin (Police Photographer)

(d) SP3 — Mohd Azhan bin Md Deros (Chemist)

(e) SP4 — Superintendent Mohd Azam bin Ab Razak (Raiding & Arresting Police Officer)

(f) SP5 — Inspector Mohd Faizol bin Ismail (Police Forensic Officer)

(g) SP6 — Nor Ummiza binti Kamaruzaman (Chemist)

(h) SP7 — Inspector Shogi a/l Arumugan (Police Investigating Officer)

[4] Acting on a tip-off, SP4 and his team of about ten police officers went to the apartment. This was at 5.30pm on the 2 July 2019. The tip-off came from an Iranian man named Ebrahim Shamsi who was arrested earlier. He had informed SP4 that he obtained his drug supplies from the apartment and had led them there.

[5] The apartment's door and grill were locked when SP4 and his team arrived. SP4 knocked on the door a few times before it was opened by the first accused, Mehdi Ebrahimkhani ('first accused'). SP4 introduced himself as a police officer and asked the first accused to open the door. The first accused however was panicky and did not accede to SP4's request. He had instead gone back in.

[6] SP4 claimed to have heard the sound of the toilet being flushed and the smell of chemicals permeating the air. The first accused came out about three minutes later to open the door. SP4 claimed that the first accused was trembling and that the second accused, Hamidreza Ghanatiaslkamari ('second accused') was standing in front of the first room looking nervous. SP4 and his team then went in and accosted both men. They were however overcome with fumes with an overbearing smell of chemicals. Their eyes teared from the fumes. SP4 and his team then chose to wait outside the apartment

with the first and second accused. They waited for ten minutes for the fumes to dissipate before going back in with both accused.

[7] SP4 went into the first room and found paraphernalia that he suspected were used to process drugs. Amongst the paraphernalia seized were two white and black containers containing liquids, one black pot, a weighing scale, a lamp, and some filter papers. He also found one transparent plastic containing crystal substances that he suspected were methamphetamine in a cupboard in the first room. He claimed that the door to the cupboard was ajar. SP4 then prepared a search list of the items seized. The items seized from the first and second accused were then brought to the police station and handed over to the investigating officer, Inspector Shogi a/l Arumugam ('SP7').

[8] The third accused, Mojtaba, was arrested three days later by SP4 on 5 July 2019. He was found in a terrace house in Sunway Damansara. His arrest was based on the information given by the first and second accused and also the apartment's tenancy agreement. SP4 did not find any incriminating evidence in SP4's house. The third accused too was brought to the police station and handed over to SP7.

[9] The owner of the apartment, Steven Chooi Wai Choong ('SP1'), was called to testify. SP1 had through a tenancy agreement dated 29 October 2018 rented the apartment to the third accused of a one year tenancy from 10 July 2018 to 9 July 2019. He had only met the third accused once when signing the tenancy agreement and had never visited the apartment since, as the rental was paid into his bank account monthly.

[10] SP7 and another police officer from the forensic department, Inspector Mohd Faizol bin Ismail ('SP5'), had before the third accused's arrest went to the apartment on 3 July 2019. A few items in the apartment were seized by SP5, which were toothbrushes, towels and some clothing items. These items were on the 12 July 2019 forwarded to Nor Ummiza bt Kamaruzaman ('SP6'), a chemist at the Chemist Department of Malaysia's forensic Deoxyribonucleic Acid ('DNA') department for analysis. SP6 had prepared a report of her analysis and findings. She had in the report stated that the DNA traces of the first and third accused were found on some of the items. Her report was tendered by the prosecution as evidence.

[11] SP7 had also handed over the seized drugs to Mohd Azhan bin Md Deros ('SP3'), a chemist at the Chemical Department of Malaysia. This was on the 5 July 2019. The seized drugs were analysed and found to be methamphetamine weighing 441.5g. SP3's report on the analysis and findings was prepared and tendered as evidence by the prosecution.

THE COURT'S DUTY AT THE END OF THE PROSECUTION'S CASE

[12] The court will need to conclude whether the prosecution has made out a prima facie case against the accused at the end of the prosecution's case; s 180(1) of the Criminal Procedure Code ('the CPC'). The accused will only be called to enter their defence if a prima facie case has been proven against them, and that they would be entitled to an acquittal if it was otherwise; s 180(2) and (3) of the CPC.

[13] The prosecution would need to adduce sufficient evidence to prove each element of the offence alleged to establish a prima facie case, which if not rebutted or unexplained, will result in a conviction; s 180(4) CPC, *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 (FC).

[14] The prosecution's evidence will also be subjected to a maximum evaluation; *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2005] 6 AMR 203 (FC). If there is more than one inference, the one favourable to the accused must be given for their benefit.

[15] The crucial task for a trial judge at the end of the prosecution's case is to ask the question of whether he is prepared to convict the accused, should the accused opts to remain silent if the defence is called. If the answer is negative, then no prima facie case should be made out against the accused, and he should then be acquitted; *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734 (CA).

FINDINGS OF THE PROSECUTION'S CASE

[16] The prosecution would need to establish the following elements, to establish a prima facie case under s 39B of the DDA 1952:

(a) that the drugs are scheduled as dangerous drugs under the DDA 1952;

(b) that the accused were in possession of the drugs; and

(c) that the accused were trafficking in the drugs.

Whether the drugs are scheduled as dangerous drugs under the DDA 1952

[17] SP3 in his report concluded that the drugs seized were 441.5g of methamphetamine. He also concluded that these drugs are categorised as dangerous drugs within the definition of s 2 of the DDA 1952, and listed in the First Schedule of the DDA 1952.

[18] The Federal Court in *Balachandran v Public Prosecutor*, held that the

evidence of the chemist can be accepted at face value and that the chemist does not have to go into the details of what he did in the laboratory, unless it is inherently incredible, or where the defence has called evidence in rebuttal through another expert.

[19] I am satisfied that SP3's evidence as set out in his comprehensive report is not inherently incredible, and that the drugs seized from the accused were of the type and weight as set out in his report, and as set out in the charge against the accused. I therefore find that the prosecution has proven that the drugs seized are scheduled as dangerous drugs under the DDA 1952.

Whether the accused were in possession of the drugs

[20] The prosecution will need to prove possession first to succeed in a charge for trafficking. Possession can either be by way of direct evidence, or by relying on the presumption under s 37(d) of the DDA 1952. The prosecution contended that all three accused had control and custody of the drugs found in the house.

[21] The two elements required to prove possession are physical control and knowledge; *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1 (FC). Thomson J in *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237 (HC), had termed them as the physical and mental element. To satisfy the physical element, Thomson J explained that the accused must be shown to be in proximity to the drugs to enable him to deal with it as if it belonged to him. As for the mental element, or mens rea, it must be shown that the accused had the intention of dealing with it.

[22] Thomson J appreciated the difficulty of proving intention by direct evidence, and in his wisdom stated that it can also be proven by way of inference derived from the surrounding circumstances in each case. The salient part of the judgment is as follows:

> To put it otherwise, there is physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some animus possidendi. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case (p 239).

[23] His Lordship went on to elaborate some of the circumstances that this

can be applied:

> If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shows such an intention. Or it must be clear that the circumstances in which it is found show such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there must be something in the evidence to satisfy the court that the person who is physically in a position to deal with the thing as his own had the intention of doing so (p 239).

[24] Possession, therefore, requires a finding of fact. It must be proven that the accused had physical control over the drugs and that he had the requisite intention to deal with them. The mere fact that the accused knew about the drugs is insufficient to incriminate him; *Husin bin Sitorus v Public Prosecutor* [2012] 3 MLJ 782; [2012] 7 CLJ 205 (CA).

[25] There is no necessity to establish exclusive possession. The Federal Court in *Public Prosecutor v Denish a/l Madhavan* [2009] 2 MLJ 194 (FC) held that possession does not need to be exclusive to an accused alone, and that two or more persons can be found to be jointly in possession. The apex court further held that the exclusivity in possession denotes that the person or person in possession had the power to exclude others from the enjoyment of the property concerned.

[26] I will firstly deal with the third accused, Mojtaba. It was revealed during the course of the trial that the apartment was initially rented to the third accused. This fact is not disputed. The third accused however was not in the apartment when SP4 and his team raided it. Only the first and second accused were in the apartment at the material time. The third accused was arrested three days after the raid. The landlord, SP1, could not verify whether the third accused had continued to stay at the apartment, as he had never visited the apartment after signing the tenancy agreement. There were no items seized from the third accused's house that could relate him to the apartment, such as the access card or keys to the apartment. The only evidence that could link the third accused to the apartment was the tenancy agreement and traces of his DNA on some of the items seized from the apartment. The prosecution had also tendered some still images of the third accused captured from the close

circuit television camera at the Seri Rania apartment's car park. The images of what it claimed to be the third accused were captured on 1 July 2019, a day before the raid.

[27] I am firstly unable to accept the still images as proof that it was the third accused. There were no witnesses called to credibly identify the person in the still image as the third accused. In any event, even if the image was that of the third accused and that he was at the car park a day before the raid, this factor does not incriminate him. There are far too many explanations that could explain his presence.

[28] I have come to the inevitable conclusion that the prosecution has failed to prove a prima facie case against the third accused. The mere fact that he was not in the apartment where the drugs were found negates any claim of knowledge and possession to satisfy this crucial element under s 39B of the DDA 1952. It is wholly insufficient for the prosecution to merely rely on the tenancy agreement or traces of his DNA on some of the items found in the apartment to implicate the third accused. There must be cogent evidence produced and relied on in order to prove possession against him. It is settled law that the court could not simply call upon the third accused to enter his defence to merely hear his explanation. I am satisfied that the third accused could not be convicted should he chose to remain silent if his defence is called.

[29] I now turn to the first and second accused.

[30] It is not disputed that the first accused, was the one that opened the door to the apartment. From the testimony of SP4, one could only access the lifts to the apartment by using an access card, which was one of the many items seized from the apartment. That the first accused was the one that opened the door meant that he had control over the apartment. This could only mean that he lived there and had unrestricted access. The fact that his DNA was found on some of the items in the house also infers that he is an occupant.

[31] The drugs were found in an open cupboard in one of the rooms wrapped in transparent plastic. The room was unlocked. The transparent plastic of methamphetamine was in clear sight, and easily accessible to the first and second accused, as they were both in the same apartment and were in close proximity to the methamphetamine when the police raided the apartment. The fact that the packet of methamphetamine was placed in an open cupboard in an open room, and in close proximity to them, infers knowledge on their part, as the drugs were visible and accessible to both of them.

[32] I have also taken into consideration the first and second accused's conduct during the raid. I accept SP4's testimony that the first accused did not

open the door immediately and had stalled for a few minutes by going back into the apartment. The sound of the toilet flushing and the overwhelming fumes that permeated the apartment suggests that they had attempted to dispose of incriminating evidence. The first accused was also trembling when opening the door. Both first and second accused according to SP4 were panicky throughout the raid. Their reaction and conduct are relevant factors and can be used to infer knowledge under s 8 of the Evidence Act 1950 and as established by the Federal Court in *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717 (FC). One of the issues raised by the defence counsel is that the prosecution should have called more officers from the raiding team to testify and not merely rely on SP4's lone testimony. I take the view that having more witnesses testifying will not necessarily result in improving a case. Quantity does not equate to quality. I have found no reason to doubt SP4's testimony as he was merely carrying out his duties as a police officer; see *Public Prosecutor v Mohamed Ali* [1962] 1 MLJ 257 (HC) and *Public Prosecutor v Teh Cheng Poh* [1979] 1 LNS 82 (HC). I therefore find the first and second accused's conduct and reaction during the raid amounts to an inference that they had knowledge of the drugs in the apartment.

[33] One of the issues raised by the defence counsel is that others had access to the apartment, as SP1 had testified that he had given two sets of keys to the apartment and that only one set was seized from the apartment. I do not see how the absence of another set of keys could give rise to an inference that others could have access to the apartment. The critical issue here is who was in the apartment at the time that the raid was done.

[34] The drugs were visible and accessible. The inevitable conclusion is that the first and second accused had the knowledge and unrestricted access to the drugs. I am of the view that both the first and second accused had control over the methamphetamine as they were the only known occupants of the apartment during the raid.

[35] I therefore find that the prosecution has established actual possession of the drugs under the charges against the first and second accused.

Whether the accused were trafficking in the drugs

[36] The prosecution had sought to rely on the statutory presumption under s 37(da)(xvi) of the DDA 1952, to establish the element of trafficking against the accused in respect of the first charge. The provision under s 37(da)(xvi) of the DDA 1952 reads as follow:

> Any person who is found in possession of —
>
> ...

A (xvi) 50 grammes or more in weight of Methamphetamine;

...

Otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

B

[37] As it has been decisively established, that the drugs seized were methamphetamine, and weighed more than 50g, I therefore find that the presumption under s 37(da)(xvi) of the DDA 1952 is applicable against the C first and second accused, and that they are therefore deemed to be trafficking as stated in the charge.

COMMON INTENTION

D **[38]** The Supreme Court in *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 (SC), held that common intention must be proved either by direct or circumstantial evidence, that there was first, a common intention to commit the offence, and secondly the participation of the accused in furtherance of that common intention. The E Court of Appeal in *Sahri Tahe v Public Prosecutor and other appeal* [2016] 4 MLJ 69 in referring to s 34 of the Penal Code held as follows:

> This section is intended to make a person liable for the commission of an offence not committed by him, but by another person with whom he shared the common intention. It is also to deal with cases in which it is difficult to prove exactly what F part was played by each of them in the commission of the offence or in cases where it is difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all ...

G **[39]** In *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 (FC), the court held:

> Under s 34 of the Penal Code, to succeed the prosecution must prove that the criminal act was done in concert pursuant to the prearranged plan or arrangement. In practice it is of course difficult to produce direct evidence to prove the intention H of an individual. In most cases, however, it can be inferred from his act or conduct or other relevant circumstances of the case. See *Mahbub Shah v King Emperor*. The doctrine of common intention is an expressed in s 34 of the Penal Code, itself which reads –
>
> I > 'When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for the act in the same manner as if the act were done by him alone' (p 267).

The court also added that the leading feature of s 34 of the PC is the element of participation in action.

[40] It is undisputed that the first and second accused were in the apartment, and that there were no other persons there during the raid. The drugs found were also in close proximity to them. There were no protests made by either of them during the raid and arrests. I am of the view that there is sufficient evidence to infer that there was a prior meeting of minds between the first and second accused and that there was therefore common intention.

DECISION AT THE END OF THE PROSECUTION'S CASE

[41] I had in giving the prosecution's case the maximum evaluation and based on the reasons set out, find that the prosecution had succeeded in proving a prima facie case against the first and second accused in respect of the charge against them, as required under s 180(4) of the CPC. The first and second accused were therefore called to enter their defence following s 180(3) of the CPC. Both of them have elected to give evidence on oath and tendered their witness statements under s 402B of the CPC.

[42] I have however found that the prosecution has failed to prove a prima facie case against the third accused. He is therefore acquitted and discharged from the charge without being called for his defence.

First and second accused called to enter defence; third accused acquitted and discharged.

Reported by Kahvita Selvaju